



United Nations General Assembly | Sixth Committee
Report of the International Law Commission (Cluster I)
28-29 October 2019

Statement by the Principle Legal Adviser of the Ministry of Foreign Affairs
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Mr. Chair,

I take this opportunity to thank all the members of the International Law Commission for their contribution to the codification and progressive development of international law, as well as for the report on its 71st Session. Brazil commends the ILC members for their continued efforts to strengthen the international law system and to promote more legal certainty for interstate relations. We would also like to recognize the important work of the Codification Division of the United Nations Office of Legal Affairs for their important support to the ILC in performing its functions.

Before addressing the first cluster of the report, Brazil wishes to recall that, out of the 229 members that the Commission had since 1948, only seven are women – that is, only 3%. This is the same proportion of women that participated in the San Francisco Conference, in 1945. And Brazil is always proud to recall that Bertha Lutz, a woman member of our delegation in San Francisco, actively contributed to ensuring that the UN Charter would proclaim the equal rights of women and men. As Member States, we should acknowledge that there is still work to be done in order to increase female representation in international legal bodies, including the International Law Commission.

I also take this opportunity to address a separate issue regarding the rules governing the ILC elections. While Article 3 of its statute establishes that ILC members shall be elected by the General Assembly, Article 11 determines that, in the case of a vacancy, the Commission itself shall fill it. Brazil considers that this rule could be revisited. After all, ILC members are elected to act on their personal capacities – and it should be up to Member States to define its composition.

Mr. Chair,

Last year, as part of the celebrations for the 70th anniversary of the ILC, the first segment of its sessions was held in New York. The positive impact of this change of venue encourages us to envisage this approach in more occasions than in the context of anniversary celebrations or the beginning of a quinquennia. We hope, therefore, that it becomes a frequent practice of the Commission, since it creates improved conditions for enhancing the interaction of States with the ILC through the early engagement of the Sixth Committee.

A fluid and constructive relationship between the ILC and the Sixth Committee tends to generate products that are relevant to the international community on both its content and its effectiveness. While the current process of written comments and annual debates create space for fruitful interactions, there are still other measures that could be taken in both poles of the relationship. The General Assembly could provide more guidance on strategic and policy priorities regarding the codification and progressive development of international law, including on the identification of new topics to be examined by the Commission. At the same time, when studying a topic, the ILC could prepare questions requiring simple and direct answers about State practice. For some countries, especially developing ones, the elaboration of written comments on the work of the ILC can be a challenging task. Addressing this shortcoming could therefore ensure more geographically balanced inputs.

Brazil would also like to propose one issue to be taken up by the Working Group on Working Methods. While the statute refers solely to articles as a possible outcome of the discussions in the ILC, other types of products were created over the past years: principles, conclusions, guidelines etc. It would be useful if the Commission provided more clarity on the taxonomy of its products, including by clarifying which are the criteria it applies to decide when choosing between one and another form of its products.

Mr. Chair,

Let me now turn to Chapter IV on Crimes against Humanity. Brazil wishes to join previous speakers in expressing its appreciation to the relevant work of the Commission on the issue, particularly to Special Rapporteur Sean Murphy, on preparing the set of draft articles on crimes against humanity, comprising 10 preambular paragraphs, 15 articles and one annex.

Since the inclusion of the topic in its programme of work, at its sixty-sixth session (2014), the Commission has been devoted to an extensive exercise that engaged not only its members, but also governments, international organizations and others.

Convinced of the need to address the existing gap in the international law framework, Brazil has been supporting this process since its inception, including by providing constructive comments to the set of draft articles.

We have positively noted that Mr. Murphy's work builds upon the Rome Statute of the International Criminal Court (ICC). During the consultation period, Brazil has proposed the inclusion of an additional provision from the Rome Statute in the preamble in order to make clear that "nothing in the draft articles shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State".

Even though we would have favored an explicit reference to it, we have positively remarked that this principle was reaffirmed in the ILC report A/74/10. The commentary presented by the Commission with regard to the third draft preambular paragraph – which recalls the principles of international law embodied in the UN Charter - includes reference to the principle that States shall refrain in their international relations from the threat or use of force against territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Furthermore, in its commentary to draft article 4 – on the obligation to prevent crimes against humanity –, the Commission quoted the International Court of Justice decision that “when engaging in measures of prevention, it is clear that every State may only act within the limits permitted by international law” (A/74/10, p. 57). Indeed, the major goals of preventing and punishing crimes against humanity must be undertaken in conformity with international law, including the general prohibition to the use of force.

Finally, Brazil welcomes the detailed provisions on mutual legal assistance in draft article 14 and in the draft annex, largely inspired by the UN Convention against Corruption, with a view to establish a broad set of cooperation, not only in investigations, but also in prosecutions and judicial proceedings. It is our view that comprehensive cooperation among States at all stages of the law enforcement process is crucial to promote the goals of preventing and punishing CaH.

Mr. Chair,

After five years of extensive work on the topic, the ILC sent to the General Assembly, in its report A/74/10, the recommendation for the “elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles”.

Brazil would join the large number of States that favor the elaboration of such Convention. The set of draft articles presented to us by the International Law Commission constitutes a carefully crafted text and a solid basis to guide our discussions.

In order to promote an inclusive and legitimate process toward drafting a convention that could be universally ratified, Brazil is of the view that negotiations should take place in the General Assembly, engaging the entire community of Nations.

In the next steps with regard to the draft set of articles, Brazil would like to raise the attention of the Commission to the need to address the relation between universal jurisdiction and ICC jurisdiction, as well as the need to include safeguards to prevent abuses of the universality principle.

Mr. Chair,

I turn now to Chapter V - Peremptory norms of general international law (*jus cogens*). First of all, I take this opportunity to thank Special Rapporteur Dire Tladi for his fourth Report and express the deep appreciation of Brazil for the quality of his research and for the careful consideration of the comments made by States during last year’s debate. Brazil appreciates such fluid interaction between the

Commission and Member States, as they contribute to results that tend to be more accepted and applied when concluded.

Brazil welcomes the adoption, on first reading, of 23 draft conclusions and the draft annex. The successful adoption of the draft conclusions demonstrates that progress can be made even in particularly complicated and sensitive subjects, as recognized by the Commission itself. While we look forward to submitting our full comments and observations in writing, we would like to make some brief remarks about three issues: i) the non-exhaustive list of *jus cogens* norms; ii) the method for establishing whether a norm has the added quality of having a peremptory character; and iii) the consequences of *jus cogens* for binding resolutions of international organizations.

Brazil commends the Commission, and the Rapporteur in particular, for finding a creative way to balance the competing interests of, on one hand, the value of an illustrative list and, on the other hand, the methodological nature of the current topic. Listing the norms that the Commission already considered as *jus cogens* facilitates their easy identification, while avoiding a lengthy substantive discussion on the hierarchy of other norms that could potentially be considered *jus cogens* as well. The list should reflect the terms used by the ILC. In this regard, we join previous speakers in favoring the replacement of the expression “prohibition of aggression” by the expression “prohibition of the use of force”.

On the method for determining whether a norm raises to the category of *jus cogens*, Brazil wishes to highlight the importance of draft conclusion 7, which is at the core of the debate. We concur with the idea of following the Vienna Convention on the Law of Treaties approach and focusing on the acceptance and recognition by the international community of States as a whole. In particular, we agree with the conclusion that only norms that are accepted and recognized by a very large majority of States as *jus cogens* can be considered as such. On the same vein, we commend the Rapporteur for his wise approach in addressing the question of regional *jus cogens*. Brazil considers that the ILC should focus its efforts on the peremptory norms of general international law, noting that the issue of regional *jus cogens* could eventually be discussed regionally, taking into account both the practical and conceptual challenges to advance such concept, and the potential existence of normative hierarchy in regional systems.

Draft Conclusion 16 deals with the consequences of *jus cogens* for binding resolutions of international organizations. Brazil would have preferred to see an explicit reference to Security Council decisions in the text. Given the hierarchy of international obligations created by Article 103 of the UN Charter, the ILC should not shy away from recognizing that the Security Council is also bound by *jus cogens* norms.

Mr. Chair,

Finally, on Chapter XI (Other decisions), Brazil notes the recent inclusion, in the long-term programme of work of the Commission, of the topics “reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law” and “prevention and repression of piracy and armed robbery at sea”.

Brazil welcomes the inclusion of the topic on reparations for gross violations of IHRL and IHL. It is a timely debate not only because of the widespread but not systematic practice on the issue, but also due to its close linkages to the Commission's work in other topics, such as *jus cogens* and general principles of law. We believe that the ILC can make a positive contribution to harmonize some standards and practices on reparations, while taking into due regard the distinctive objectives, principles and mandates that inspire the different regimes dealing with reparations for serious violations of IHRL and IHL.

Brazil also takes note with interest of the ILC decision to include in its Long-Term Programme of Work the topic "prevention and repression of piracy and armed robbery at sea". As indicated in the report, there are already global and regional treaties and other instruments dealing with the topic, and we coincide with the Commission's view that any eventual work on the matter would not seek to alter UNCLOS provisions.

Among the topics that were already inscribed in the Long-Term Programme of Work, Brazil would favor that the Commission include "extraterritorial jurisdiction" in its active agenda.

Thank you, Mr. Chair.